SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 284

LOUISIANA EDUCATION COMMISSION FOR NEEDY CHILDREN, ET AL,

Appellants,

versus

BRYAN POINDEXTER, ET AL,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, THREE JUDGE COURT

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO AFFIRM

LEANDER H. PEREZ
1806 Commerce Building
New Orleans, Louisiana

LUKE A. PETROVICH
P. O. Box 200
Buras, Louisiana
Counsel for Appellants

INDEX

Opinions Below 1

Jurisdiction 2

Argument 2

Conclusion 16

Certificate of Service 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 284

LOUISIANA EDUCATION COMMISSION FOR NEEDY CHILDREN, ET AL,

Appellants,

versus

BRYAN POINDEXTER, ET AL,

Appellees.

APPELLANTS' BRIEF OPPOSING APPELLEE'S MOTION TO AFFIRM

Appellee, United States of America, filed a Motion to Affirm judgment sought to be reviewed on appeal from a Three Judge Court pursuant to Rule 16 (1) (C) of the Rules of this Court. Appellants now file a brief opposing said Motion to Affirm, pursuant to Rule 16 (4) of the Rules of this Court.

OPINIONS BELOW

The opinion of the Three Judge District Court was on the merits and on Defendants' Motion to Dismiss, after full trial. It is cited as Civil Action No. 14683, Docket of the Eastern District Court, New Orleans Division, decided and entered March 19, 1968. The

opinion is not reported but a copy thereof is in Appendix B, of Appellants' jurisdictional statement filed herein. This Court's denial of Appellants' Motion for leave to file petition for writ of prohibition based on a Motion and Affidavit to recuse the Lower Court Judges, is reported in 390 U. S. 939. The merits of the Motion to Recuse as well as all of the other matters herein are still in issue in this appeal.

JURISDICTION

The jurisdiction of this Court is based on an appeal under U.S.C. Title 28, Section 1253, from an order and opinion of a Three Judge District Court, entered March 19, 1968. A notice of appeal was filed April 19, 1968 and jurisdictional statement was filed on July 12, 1968. The questions presented and the statement of the case have already been set out in Appellants' jurisdictional statement.

ARGUMENT

1. The Appellee's Motion to Affirm must be denied on the ground that from the judgment sought to be reviewed on appeal it is manifest that the questions on which the decision of the cause depends are extremely substantial as to demand further argument. The case must be briefed and reviewed and is too substantial to be simply decided on a Motion to Affirm. The Act and the entire record of the case clearly show that there is no purpose and there is no reasonable effect of the Act to continue segregated, privately operated schools for white children. Nor does the act or any part of the record show an affirmative and purposeful State aid promoting private discrimination. The District Court

and the United States of America, of course, disagree with these conclusions. The defendants now request this Honorable Court to settle these issues not through the mechanics of a Motion to Affirm, but by a complete and rightful appeal, with the submission of briefs and oral arguments and consideration by all of the Justices of this Court.

2. The Appellee's Motion to Affirm lists several misstatements of fact. Page 3 of its Motion to Affirm states that "Act 99 authorizes State tuition grants to private, non sectarian, elementary and secondary schools attended by children who are eligible to attend public schools —". The Act clearly states as follows: "— to authorize said Commission to approve financial aid scholarships to children attending private, non sectarian, elementary and secondary schools, located in this State". There is nothing in the Act or in the record that shows that these children are eligible to attend public schools. The record, in fact, clearly shows that many of the children are not eligible to attend public schools because they have been forced to drop out of public schools, either for personal or psychological reasons, they are retarded children, or they have been expelled from public school by the public school authorities. The purpose of Act 99 is to provide financial aid scholarships to these children in order to help them attend some educational institution and to help correct or avoid juvenile delinquency, school drop outs, and juvenile crime. The Act clearly states "to approve financial aid *to children* attending private, non sectarian, elementary and secondary schools, located in the State". There is no authorization for State tuition grants to private, non sectarian, elementary and secondary schools. The Motion to Affirm also states that "Act 99 was characterized as

a 'stand by" for the earlier legislation by its sponsors more than adequately supports the Court's conclusion" that Act 99 was nothing more than a series of tuition grant statutes enacted by the Louisiana Legislature to encourage and support racially segregated private schools which white students in the State could attend in place of desegrated public schools. This statement and conclusion is gratuitous on the part of the plaintiff and the Lower Court. A reading of Act 99 and a perusal of the record in this case shows that Act 99 is in no way dependent on any other legislative Act, especially Act 147 of 1962. Act 99 is clearly independent within itself and the funds for the implementation of said Act come out of welfare funds to combat school drop outs, juvenile delinquency and juvenile crime which is all within the police power of the State. The Act is clear and the record so substantiates, that there is nothing in the Act the purpose of which is the natural or reasonable effect to continue segregated privately operated schools for white chidlren or is a purposeful State aid program promoting private discrimination. There is nothing in the Act or in the record which substantiates the conclusion that the scholarship aid under Act 99, which is an amount not to exceed $3,500,000.00 out of welfare funds will damage negroes by draining students, teachers and funds from the desegrated public school system into a competitive segregated school system. In fact, the record clearly shows that there is a total of 1,082,576 school age children in Louisiana, with 789,412 of these students attending public schools and 151,697 attending non public schools, or a total of 941,109 school age children attending schools, leaving 141,467 school age children unaccounted for and not attending either public or non-public schools. The main purpose of Act 99, with the meager allotment of $3,500,000.00

for any fiscal year, is to provide for these 141,467 school age children who are either staying at home or running the streets, are school drop outs, and are more apt to become involved in juvenile delinquency and juvenile crime. Furthermore, the conclusions of the United States and the Three Judge Lower Court that it will "shatter to bits the public school system" or will "endanger the public school system and equal opportunities for negroes" are false. The Act and the record clearly refute these conclusions. As stated, there are 789,412 children attending public schools in Louisiana. There is a total investment in public school sites, buildings and equipment of $734,794,952.14, and the expenditure for the education of these public school children by the State of Louisiana for the year 1965-1966 amounted to $387,545,312.71. It is idiotic for the Federal attorneys to contend that Act 99, which provides scholarship aid aimed at combatting drop outs, juvenile delinquency and juvenile crime *by helping some 141,467 school age children who are not attending either public schools or non public schools*, with a maximum expenditure of $3,500,000.00 out of the welfare funds and not education funds, will destroy the vast public school system of the State of Louisiana, which has an annual expenditure of over $387,000,000.00, a figure over 110 times larger than the funds provided by Act 99.

The Act provides additional educational opportunities to 141,467 negro and white children who are unaccounted for and who are not attending either public or non public schools. The program is based on a beneficial, racially neutral policy. The United States of America, in face of the gigantic and still growing crime rate among our juveniles throughout the country, which the record in

this case confirms as staggering, should be encouraging this type of legislation instead of trying to declare it unconstitutional simply because by implication and by suggestion, and without evidence, fact or logic, it claims that the Act discriminates against public education and against negroes. The mere reading of Act 99 will show the differences and lack of similarities between its program and the programs created by any previous Louisiana legislation which has come before the Federal Courts. This basic question is so substantial that it must be submitted to this Court for further argument.

3. The other question that is so substantial is whether newspaper articles and opinions are the best evidence as opposed to direct statements, documents and living witnesses. The Appellee states on page 5 of its Motion to Affirm that "it was proper for the court below to consider the full facts and circumstances surrounding enactment of the legislation in determining its constitutionality." The Appellants have no quarrel with that proposition. We maintain that the *Court did not consider the full facts and circumstances;* that it simply took newspaper articles, and no other evidence, to come to its conclusion and opinion. The Appellants contest the right of the Court to take newspaper reports regarding alleged statements of legislators when the legislators themselves were available and disregard a statement of legislative intent filed in the record, which was signed by twelve legislators who are proponents of the bill.

The Appellee claims that this argument on the part of the Appellant regarding newspaper clippings as evidence was rejected in Poindexter No. II, 389 U. S. 571, which was similarly affirmed by this Court. Appellants

maintain that no real appeal was ever granted the other defendants before the Supreme Court of the United States. The matter was settled by a Motion to Affirm and it is the desire of Appellees herein to again settle these vital questions by a Motion to Affirm. They cannot face this Court in briefs and in oral arguments and claim that newspaper gossip, propaganda and hearsay is better evidence than living witnesses, certified documents and affidavits. The Court, in granting the plaintiffs the privilege of resorting to this type of evidence, clearly violated defendants' right of due process of law. Appellants do not quarrel with Appellee's position that "statements by sponsors of legislation are, of course, traditionally relied on in assessing a statute's legislative history". A statement of legislative intent was filed of record but ignored by the Court. Our quarrel is that newspaper gossip and hearsay is not the best evidence, especially when contradicted by documentary evidence and by living witnesses and by the fact that the newspaper reporters, newspaper offices and editors were personally biased against the legislation involved. In fact, the authors of the newspaper articles admitted in their testimony that they were uncompromisingly against Act 99. The Appellant also points out the unreliability of newspaper articles and refers this Court to pages 23 and 24 of its jurisdictional statements. We are sure Vice President Hubert Humphrey and Attorney General Ramsey Clark appreciate the unreliability of newspaper reports and newspaper quotations of statements. For example, a statement by Attorney General Ramsey Clark in the Times Picayune of October 15, 1967 accuses the Times Picayune of misquoting him when that paper attributed statements to him concerning his possible prosecution of New Orleans District Attorney, Jim

Garrison. Vice President Hubert Humphrey accused the same New Orleans newspapers involved in this case of misquoting him when they said that he had enough zip left in him, that if he lived under conditions of certain minority groups, he would lead a full time revolt himself.

The Court quotes as its authority to accept newspaper reports and clippings as evidence the case of *Hall vs. St. Helena Parish School Board*, 197 Fed. Sup. 649 (E D La.). We point out, as we have before, that the introduction of newspaper clippings in the St. Helena case was made without any objection by counsel for the defendants, whereas, in the case at hand, objection was timely urged to such alleged evidence. Furthermore, this issue was never ruled on by this Court. Here again is a vital, substantial, extremely important issue that must be considered and heard by this Court through briefs and oral arguments and it cannot be disposed of simply through a Motion to Affirm, which may be considered by only one Justice. This matter must be considered by all of the Justices after perusal of the record and after briefs have been prepared by both sides and arguments have been completed. Without the Court's consideration of this issue, it may well be that in the future, a plaintiff, to prove his case, simply has to provide newspaper propaganda, gossip and hearsay; an ideal situation for a despotic and totalitarian State. The ironic part of the plaintiffs' case and the lower Court's decision is that no other evidence was submitted by the plaintiff other than these newspaper articles. Certainly, this question is so substantial as to warrant further briefs and arguments.

4. The Appellee maintains through implication in

its Motion to Affirm that this Court has already ruled on the question of Motion to Recuse when it rejected plaintiffs' Motion to file petition for writ of prohibition, 390 U. S. 939. Appellants feel that the Appellee is taking a lot for granted. The only issue was the leave to file a writ of prohibition to determine whether or not the trial of the case in the lower Court would continue before the Presiding Judges, and not whether or not the Motion to Recuse was proper and adequate. The defendants certainly have the right to have this Court consider the merits presented by the Motion to Recuse and to consider whether or not there was any bias or prejudice on the part of the Presiding Judges. It can equally be implied that the Presiding Judges are biased, especially since they eagerly accepted the flimsy evidence submitted by plaintiffs, and used said evidence for the basis of their opinion and at the same time, ignored substantial evidence offered by defendants. This basic question of whether the Presiding Judges were prejudiced and biased or had a bent of mind against any Louisiana legislation which benefits children not in public school cannot be discarded on a Motion to Affirm for it is manifest that this question be considered on briefs and arguments before the entire Court.

5. The Appellees allege in their Motion to Affirm that the District Court was correct in rejecting the prevailing ruling of *Griffin vs. County School Board of Prince Edward County*, 239 F. Supp. 560 (E.D. La.), because plaintiff alleges that the State has deliberately devised to issue grants to support segregated schools. This allegation is not supported by the wording of the Act itself or by any part of the record of the case. In fact, the record clearly shows to the contrary, as

previously pointed out. In any event, the basic rule of the Griffin case has been disregarded by the Lower Court and it is now a matter for this Court to decide whether or not the prevailing holding of the Griffin case is correct or whether it is to be overruled and the decision of the lower Three Judge Court is to stand. This must be decided by a complete appeal, by all the Judges of this Court, after briefs and oral argument, not by a Motion to Affirm.

Appellants maintain that no decision of this Court has held that any State action or support at all with respect to a private non integrated school is repugnant to the 14th Amendment to the United States Constitution. In fact, this Court has held to the contrary in its school bus transportation cases and its various school text book cases, even as recently as July 10, 1968 in *Board of Education of Central School District No. 1 vs. Allen*, 80 Supp. Ct. 1923 (1968). Furthermore, this matter must be considered on briefs and arguments because the Griffin case is in harmony with the Congressional definition of public schools. Title IV of Civil Rights Act of 1964, 42 U.S.C.A. 2000 (c) Sec. 401.

Matters so vitally important must not be resolved in a mere Motion to Affirm. The Appellee alleges that this argument on the part of the Appellant that the lower Court's decision is contrary to the holding in the Griffin case has already been ruled on by this Court in the Poindexter No. II case, 275 Fed. Supp. 833; 389 U.S. 576; 19 L.Ed. (2nd) 780 (1968). Appellants maintain that this issue was never considered or submitted to this Court in any case in the past through briefs on the merits and oral arguments. We urge that it be resolved in

this manner at this time by the entire Court. The defendants so urge as a matter of right.

6. The Appellee contends that the definition of public schools contained in Title IV of the Civil Rights Act of 1964 is applicable only to Title IV and it does not purport to define any type of institution with which the State might be unconstitutionally involved in racial discrimination. It is absolutely clear from the Civil Rights Act itself that a State or other local agency has a right to provide governmental funds or property to elementary or secondary educational institutions. This right has been recognized by this Court in its various school bus transportation cases and school text book cases. In fact, paragraph C of Section 401 of Public Law 88:352 says public school means: "any elementary or secondary educational institution — operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from governmental sources." It cannot be argued that the provision was intended to apply only to Title IV or to Federal grants to public schools when the above provision specifically provides that such "public school is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental property or funds or property derived from a governmental source." But regardless of what the intention, the issue is at hand and it must not be resolved in a Motion to Affirm. It is so substantial as to demand briefs and oral arguments and consideration by all members of the Court.

7. Another question which is so substantial that it merits further argument, and which was not mentioned

in plaintiffs' Motion to Affirm, is whether the Court erred in granting injunctive relief to the plaintiff without plaintiffs' alleging or proving any injury or damage, irreparable or otherwise. Appellants maintain that the United States Attorney General nowhere alleged or proved any injury or damage, irreparable or otherwise, to the United States or anyone else as a result of the enactment or implementation of Act 99 of 1967, although this is a basic requirement of Rule 65 of the Federal Rules of Civil Procedure. The Supreme Court has held in *Mass. State Grange, et al vs. Benton, Attorney General of Mass., et al,* 1926, 272 U. S. 525, 527; 47 Sup. Ct. 189, 190, and in *Cavanaugh, et al vs. Looney, Attorney General of Texas, et al,* 1919, 39 Sup. Ct. 142, 143, that no injunction ought to be granted against officers of a State clothed with authority to enforce a State law in question unless in a case reasonably free of doubt and when necessary to prevent great and irreparable injury. In this case there is *serious* doubt that anyone would be hurt by Act 99, especially the public school system and the negroes of the State of Louisiana. In fact, the record clearly shows that more negroes would be helped by the enactment and implementation of Act 99 and that the public school system and the State of Louisiana would be helped in that some 141,000 children who are not now attending public or non public schools could be encouraged to attend some school and become better citizens of our State and Nation.

It follows, then, that the basic and substantial questions which merit the full consideration of this Court are in fact whether or not Act 99, 1967, Louisiana Legislature, is unconstitutional and whether or not it provides aid to educate Louisiana children on a beneficial racially neutral policy and whether the judgment of the

lower Court prohibits the State of Louisiana from alloting any aid or assistance to its children for the purpose of combatting drop outs, juvenile delinquency and juvenile crime, unless they attend public schools. Appellants maintain that Act 99, its implementation and the entire record of the case clearly refute the position of the plaintiff and the lower Court's holding. These issues, may it please the Court, are extremely substantial and demand further argument.

8. The defendants, as a matter of right, are entitled to be heard on appeal by the entire Court with briefs on the merits and oral argument. 28 U.S.C. 1253. If prohibited from so doing, they would be deprived of the fundamental and basic right of appeal granted in 28 U.S.C. 1253 and deprived of their constitutional right of due process of law as granted by the 5th Amendment of the United States Constitution. *Radio Corporation of America vs. U. S.*, 341 U. S. 412, (1950); *Ferguson vs. Skrupa*, 372 U. S. 726; 10 L.Ed. (2nd) 92; 341 Sup. Ct. 1028; 95 ALR 2nd 1347.

9. In order to afford the Appellants an appeal as provided in 28 U.S.C. 1253, the case must be submitted to the Supreme Court for review and the Appellants must be granted as a matter of statutory right an opportunity to file briefs on the issues and an opportunity to present oral arguments. Any other approach would be a deprivation of that right. A decision of this case by the Supreme Court of the United States on a Motion to Affirm, after the Appellant has filed only a jurisdictional statement as required by the Court rules, is certainly not sufficient review. The Supreme Court, in order to properly review this case, must have before it the record as it affects the issues on appeal, complete

briefs of all parties concerned, and which parties must be afforded an oportunity for oral arguments.

10. A decision by a Three Judge Court is appealable to the Supreme Court as a matter of right. *Radio Corporation of America vs. U. S. D. C. Ill. 1950,* 95 Fed. Supp. 660, Affirmed, 71 Sup. Ct. 806; 341 U S. 412; 95 L.Ed. 1062. Judge Cardoza's definition of appeal, as recorded in Webster's Third New International Dictionary says that an apeal is "to call upon or refer to another as a recognized authority for corroboration, vindication or decision." No real appeal can be effected to the Supreme Court as guaranteed by Federal statute for the resolving of the issues of this case without having presented to the appellate Court briefs and arguments on the issues by the necessary parties.

11. Whether it was wise for the State of Louisiana to enact Act 99 and whether it would be useful in combatting crime, which the lower Court denies, is not a matter to be decided by the Courts but is a matter for the Legislature of Louisiana to decide, so long as the basic constitutional rights of its citizens are not violated. *Ferguson vs. Skrupa, Supra.* The Ferguson case further held that under the system of government created by the Constitution, it is up to the Legislators, not the Courts, to decide the wisdom and utility of legislation. The Courts do not substitute their social and economic beliefs for the judgment of legislative bodies and are not concerned with the wisdom or the appropriateness of legislation.

12. Under U.S.C. Title 28, Section 1253, a judgment of a Three Judge District Court enjoining enforcement of a State statute as being in violation of the 14th

Amendment, is properly brought before the Supreme Court of the United States by appeal. This appeal is a matter of right granted not only by this Statute but by the due process clause of the 5th Amendment, and by the United States Supreme Court decisions in *Radio Corporation of America, Supra,* and the *Ferguson case,* Supra. If the Appellees contend that they have a right to file this Motion to Affirm and this Court has a right to grant said Motion to Affirm by Rule 16 C of the Supreme Court Rules, prohibiting defendant a full appeal with briefs and oral argument, then the Appellants maintain that Rule 16 C, as it applies to this case, this appeal and to appeals of this type, is unconstitutional, primarily because it violates the statutory right of appeal and thereby violates the basic right of due process of law.

If the Motion to Affirm is denied, the Appellee will still have every opportunity to properly present its case on appeal on the filing of briefs and on oral arguments. If the Motion to Affirm is granted, the defendants are deprived of an opportunity to properly present an appeal of this case by the filing of briefs and by oral arguments before the entire Court, and in essence, they will be deprived of the right of appeal granted by 28 U.S.C. 2353 and in effect denied the due process of law.

CONCLUSION

For the many reasons stated and because it is manifest that the questions on which the decision of the cause depends are extremely substantial as to need further argument, and for the further reason that if Appellee's Motion to Affirm is granted, Appellants will be deprived of the right of appeal guaranteed to them by law, the Motion to Affirm should be denied.

Respectfully submitted,

LEANDER H. PEREZ
1806 Commerce Building
New Orleans, Louisiana

LUKE A. PETROVICH
P. O. Box 200
Buras, Louisiana

Counsel for Appellants

CERTIFICATE OF SERVICE

I, Luke A. Petrovich, one of the Attorneys for the Louisiana Education Commission for Needy Children, et al, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of August, 1968, I served copies of the foregoing Appellants' Brief Opposing Appellee's Motion to Affirm, upon parties hereto by mailing copies thereof to the Attorneys listed below by United States Mail, first class, (air mail where applicable), postage prepaid.

Solicitor General
Washington D. C. 20530

For the United States of America, Plaintiff-Intervenor

Hon. Louis Lacour, U. S. Attorney
500 St. Louis Street
New Orleans, Louisiana

For the United States of America, Plaintiff-Intervenor

Hugh W. Fleischer
Attorney, Dept. of Justice
1723 Masonic Temple Bldg.
New Orleans, Louisiana

For the United States of America, Plaintiff-Intervenor

A. P. Tureaud, Esquire
A. M. Trudeau, Esquire
1821 Orleans Avenue
New Orleans, Louisiana

Attorneys for Bryan Poindexter and other minors, original plaintiffs

Charles H. Jones, Jr., Esquire
10 Columbus Circle
New York, New York

Attorneys for Bryan Poindexter and other minors, original plaintiffs

Cy Courtney, Esquire
National Bank of Commerce Building
New Orleans, Louisiana

Attorneys for Mrs. Thelma Deamer, et al, defendant-intervenors

Richard Cadwallader, Esquire
Louisiana National Bank Bldg.
Baton Rouge, Louisiana

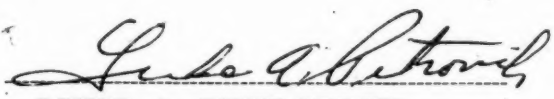
Attorneys for Mrs. Thelma Deamer, et al, defendant-intervenors

Sidney J. Parlongue, Esquire
National Bank of Commerce Bldg.
New Orleans, Louisiana

Attorney for Garden District Academy

Walter E. Doane, Esquire
Room 205, Southern Marine and Aviation Bldg.
New Orleans, Louisiana

Attorney for Ninth Ward Elementary School and Armond J. Duvio and Carrollton Elementary School Association, defendants



LUKE A. PETROVICH
Attorney at Law
P. O. Box 200
Buras, Louisiana